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No. 10-176

Supreme Court, U.S.
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In The
Supreme Court of the United States

TRACY YOUNG,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF IN OPPOSITION

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FACTS AND PROCEDURAL HISTORY

On the evening of September 8, 2006, twenty-one year-old Aaron Arnold and twenty-six year-old Dionne Grayson completed their shifts as waiters at the Olive Garden Restaurant in Baton Rouge, Louisiana. Friends, Arnold and Grayson left the Olive Garden together and walked to their cars. Grayson could not start her car, so Arnold drove Grayson across the street to get some gas. Arnold and Grayson returned to the rear parking lot of the Olive Garden at approximately 11:45 p.m. Upon returning, a man armed with a gun confronted Arnold and Grayson. That man, alleged to be petitioner Tracey Young, demanded money from both Arnold and Grayson. While the armed man made the robbery demand, another man, Sanchez Brumfield,[1] remained in a nearby white Monte Carlo car as the getaway driver. Arnold and Grayson were startled and did not immediately comply with the robber's demands. Irritated by the delay in response, Brumfield yelled to the armed man to "just shoot them." The armed man obliged, firing multiple shots at Arnold and Grayson. Two bullets hit Arnold, striking him in the chest and arm. The gunfire struck Grayson in the legs. The shooter then ran to the getaway car, and he and Brumfield fled the scene. Arnold died as a result of his gunshot wounds. Grayson survived but suffered a severe leg injury.

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[1] Sanchez Brumfield has already been tried and convicted of the first-degree murder of Aaron Arnold. He has been sentenced to death. His case is on appeal.

Evidence against the alleged shooter, petitioner Tracey Young, includes two photographic lineup identifications made by Dionne Grayson and Nancy Segura. Segura, a Mexican national who worked as restaurant kitchen staff, also witnessed the murder. Both Grayson and Segura identified petitioner as the shooter from six-person photographic lineups. Both Grayson and Segura were shown multiple photographic lineups prior to being shown the lineup containing petitioner. Neither Grayson nor Segura chose a person from the prior lineups. A suppression hearing has already been conducted as to Grayson's identification, and her identification has been deemed admissible. Segura's suppression hearing has been postponed pending her return from Mexico.

In addition to these identifications, the state has corroborating evidence implicating petitioner, including, but not limited to: multiple eyewitnesses placing a white Monte Carlo getaway car at the scene during the time of the crime; petitioner's registered ownership of the same model white Monte Carlo vehicle, as well as his admitted use of the vehicle at the time of the crime; a videotaped statement by Brumfield implicating both himself and petitioner as having committed the crime; petitioner's estranged wife's observing drastic changes in petitioner's physical appearance and behavior immediately following the crime, as well as his indicating to her a sudden desire to want to move to California.

On November 9, 2006, an East Baton Rouge Parish grand jury indicted petitioner Tracey Young

for having committed the first-degree murder of Aaron Arnold. The state subsequently provided notice of its intent to seek the death penalty. Numerous pre-trial motions were filed in the case, including a defense motion to qualify Dr. Roy Malpass as an eyewitness identification expert.

On January 8, 2009, the trial court considered petitioner's motion to qualify Dr. Malpass. Over state objection, the court qualified Dr. Malpass as an expert in eyewitness identification psychology. At the conclusion of the hearing, the court deferred ruling on the question of whether Dr. Malpass should be prohibited from testifying because his testimony was unreliable and irrelevant. Then, on January 14, 2009, the trial court ruled that Dr. Malpass could testify as an eyewitness identification expert as long as his testimony was relevant.

The state sought writs to Louisiana's First Circuit Court of Appeal. On May 14, 2009, the court of appeal, in a two-to-one decision, denied the state's writ application. *State v. Young,* 09-0154 (La. App. 1 Cir. 5/14/09) (Kuhn, J. dissenting) (unpublished). The state then filed a writ application to the Louisiana Supreme Court. Oral arguments were conducted, and on April 5, 2010, that court granted the state's writ application and reversed the trial court ruling. *State v. Young,* 09-1177 (La. 4/5/10), 35 So.3d 1042. Petitioner filed an application for rehearing, which was denied on May 7, 2010. *State v. Young,* 09-1177 (La. 5/7/10). Petitioner then sought a writ of certiorari

with this Court. Pursuant to this Court's order, the state now submits the instant response.

ARGUMENT

Petitioner has asked this Court to consider whether a *per se* rule regarding the introduction of eyewitness identification expert testimony would violate the United States Constitution. For multiple reasons, petitioner's writ application to this Court must be dismissed. Initially, this Court must decline to extend jurisdiction because the federal question petitioner now presents was neither presented to, nor considered by, the Louisiana courts at any stage of the state court proceedings. Additionally, petitioner's recently discovered federal claim must also be dismissed because his claim is predicated on a misstatement of Louisiana law. Contrary to petitioner's assertion, Louisiana did not adopt a *per se* rule regarding a particular class of expert witness testimony. Rather, in *State v. Young*, the Louisiana Supreme Court actually rejected the state's proposed adoption of a bright-line rule and relaxed prior precedent, determining only that the trial court abused its discretion **in petitioner's case**. Finally, even were one to erroneously assume Louisiana has adopted a bright-line rule respecting a particular form of expert testimony, such an evidentiary rule passes constitutional muster.

THIS COURT MUST DISMISS PETITIONER'S WRIT FOR WANT OF JURISDICTION. THE LOUISIANA STATE COURTS WERE NEITHER PRESENTED WITH, NOR DID THEY CONSIDER, THE FEDERAL QUESTION PETITIONER NOW PRESENTS TO THIS COURT.

Initially, the state submits that this Court cannot extend jurisdiction to review petitioner's claim that his Sixth and Fourteenth Amendment rights have been violated. Accordingly, this Court must dismiss the application for want of jurisdiction.

28 U.S.C.A. §1257(a) states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Absent very rare exceptions, this Court has adhered to the rule in reviewing state court judgments under 28 U.S.C.A. §1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court

that rendered the decision now sought to be reviewed. *Adams v. Robertson,* 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1996). *See also Heath v. Alabama,* 474 U.S. 82, 87, 106 S.Ct. 433, 436-37, 88 L.Ed.2d 387 (1985); *Illinois v. Gates,* 462 U.S. 213, 217-19, 103 S.Ct. 2317, 2321-22, 76 L.Ed.2d 527 (1983); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed. 849 (1940). When the highest state court is silent on a federal question, this Court assumes that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987), and the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here." *Webb v. Webb,* 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed.2d 392 (1981).

In his writ to this Court, petitioner contends that Louisiana has pronounced a *per se* evidentiary rule that may infringe upon his Sixth and Fourteenth Amendment rights. Petitioner's application, however, makes only a blanket averment that this Court has jurisdiction pursuant to 28 U.S.C.A. §1257(a). (Petition, p. 1.) Petitioner's writ provides absolutely no explanation to support why this Court possesses jurisdiction of his case. The lack of explanation is because petitioner altogether failed to present his federal question to the Louisiana state courts.

To be very clear, at no point during any stage of the state court proceedings did petitioner ever scribe, posit, argue, reference, or otherwise advance that a *per se* exclusion of his eyewitness identification expert would be a violation of either the Louisiana or United States Constitutions. Upon a close examination of the **complete** record, the only issue considered by the state courts involved whether witness Dr. Malpass was competent to testify under Louisiana Code of Evidence Articles 403 and 702.

Nowhere in the existing court record did petitioner ever claim that his Sixth and Fourteenth Amendment rights would be violated by the adoption of a bright-line exclusionary rule regarding eyewitness identification experts. Not coincidentally, the trial court expert hearing transcript, the state's supreme court writ application, petitioner's response to that writ application, and petitioner's application for rehearing were neither referenced nor included in petitioner's writ application to this Court. Petitioner's writ application to this Court violated United States Supreme Court Rule 14(1)(g)(i)[2] when it omitted this

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[2] "If review of a state-court judgment is sought, **specification of the stage in the proceedings**, both in the court of first instance and in the appellate courts, **when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception,**

(Continued on following page)

information. Of course, had these documents been either referenced or provided, petitioner would have submarined any possibility of jurisdiction.

Nonetheless, because this pertinent information was omitted, it has become necessary for this Court to be presented with a proper understanding of the case's procedural history. Understanding that Louisiana had never adopted a *per se* rule of exclusion respecting eyewitness identification experts, the state specifically briefed during the writ process that Louisiana should adopt a *per se* rule and always exclude eyewitness identification experts. *Original Brief on Behalf of the State of Louisiana* (Oct. 14, 2009), (available in 2009 WL 6352151). Upon being presented with this argument, defendant's response briefs, while acknowledging the state's position and strenuously arguing against the adoption of any such *per se* rule, never once mentioned that an adoption of a *per se* rule would violate his Sixth Amendment rights. *Original Brief of Respondent Tracey Young on the Merits*, p. 5 (Nov. 12, 2009), (available in 2009 WL 6352152, "The State asserts that this unbroken line of decisions indicates that Louisiana applies a bright-line rule against expert testimony on eyewitness

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portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(c)."

identification."); Not even petitioner's *amicus curiae* brief, filed by the Louisiana Association of Criminal Defense Lawyers (LACDL), mentioned a federal issue, much less the federal constitutional issue raised in this writ application. *Amicus Curiae Brief on Behalf of the Louisiana Association of Criminal Defense Lawyers*, (Nov. 16, 2009) (available in 2009 WL 6352153). (*See also Amicus Curiae Brief*, p. 14, 2009 WL 6352153, "While the state is clearly mistaken in arguing *Stucke* created a bright-line rule prohibiting this testimony, it is true that the language of *Stucke* tilts toward a preference of exclusion of evidence [. . .]."). In fact, a critical inspection of petitioner's responses reveals he never referenced the mere terms "Federal," "Constitution," or "Constitutional" in his writings, much less provided a specific allegation that his Sixth Amendments rights would be compromised. Not surprisingly, the Louisiana Supreme Court neither questioned nor considered the possibility of a federal constitutional issue during oral arguments. This omission occurred despite the fact that the state actively sought the adoption of a bright-line rule of inadmissibility during those arguments. And an examination of the *Young* decision shows that the state supreme court relied exclusively upon Louisiana statutory law and case precedent to rule that Dr. Malpass was incompetent to testify. The *Young* opinion, which coincidentally did not adopt a *per se* rule regarding eyewitness identification expert testimony, makes absolutely no mention of any federal issue, much less a possible federal Constitutional issue.

Further negating any claim for jurisdiction is petitioner's application for rehearing, which was filed immediately after the *Young* decision. Despite the fact that the state supreme court had supposedly adopted a *per se* rule prohibiting his expert witness from testifying, petitioner's rehearing writ never mentioned either that (1) the court had adopted *a per se* rule or (2) that the adoption of a *per se* rule now violated his federal constitutional rights. (*Petitioner's Application for Rehearing* is appended at the end of this brief.). Once again, the mere terms "Constitutional" and "Federal" remained conspicuously absent from his rehearing application. While presenting a federal claim for the first time in a state rehearing application would not satisfy §1257, petitioner did not bother attempting to raise the issue on rehearing.[3]

Prior to his writ application with this Court, petitioner's only argument at the state level was that no *per se* rule existed in Louisiana, no *per se* rule should exist in Louisiana, and that the trial court did not abuse its discretion in qualifying Dr. Malpass as an expert. *Original Brief of Respondent Tracey Young on the Merits*, p. 15 (Nov. 12, 2009), (available at 2009 WL 6352152, "This court should make it clear that no *per se* rule excluding expert eyewitness identification testimony exists in Louisiana."). Although clearly

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[3] *See also* La. Sup. Ct. Rule IX, containing no restriction as to the scope content in a rehearing application.

aware that the *per se* rule was being sought, never once did petitioner state that adopting a *per se* rule would violate his constitutional rights. Petitioner cannot deny he was well aware of the issue. He simply chose to ignore it. He now attempts to pursue a federal issue neither presented nor considered at any state court level.

In *Howell v. Mississippi*, 543 U.S. 440, 125 S.Ct. 856, 160 L.Ed.2d 873 (2005), this Court dismissed a capital petitioner's writ as improvidently granted. In doing so, this Court stated:

> Congress has given this Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257(a) (emphasis added). Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim "was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) *(per curiam)*; see also *Illinois v. Gates*, 462 U.S. 213, 218, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (tracing this principle back to *Crowell v. Randell*, 10 Pet. 368, 392,

> 9 L.Ed. 458 (1836), and *Owings v. Norwood's Lessee*, 5 Cranch 344, 3 L.Ed. 120 (1809)).
>
> * * *
>
> A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Baldwin v. Reese*, 541 U.S. 27, 32, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004). In the context of § 1257, the same steps toward clarity are just as easy to take and are generally necessary to establish that a federal question was properly presented to a state court. Petitioner did none of these things. 543 U.S. 440, 444, 125 S.Ct. 856, 859, 160 L.Ed.2d 873 (2005).

Howell, at 543 U.S. 443-44, 125 S.Ct. 858-59.

Indeed, it is very easy to give a state court notice that a federal constitutional issue should be considered. Nevertheless, like the capital petitioner in *Howell*, this petitioner completely neglected to give the state courts a chance to address any federal question. His *ex post facto* attempt to transform a state court evidentiary ruling into a federal constitutional question is an attempt to circumvent federalism. Petitioner passed on his chance to present his federal issue at the state level, and the State of Louisiana never considered it. Accordingly, his writ

application must be dismissed for want of jurisdiction.

PETITIONER'S ARGUMENT IS PREDICATED ON A MISSTATEMENT OF LAW. LOUISIANA HAS NOT ADOPTED A *PER SE* RULE CONCERNING EXPERT EYEWITNESS IDENTIFICATION TESTIMONY.

In addition to the above, the state submits that petitioner's claim must be dismissed because it is predicated on a misstatement of Louisiana law. *See* United States Supreme Court Rule 15. Petitioner's contention that Louisiana has created a *per se* bar to eyewitness identification experts is inaccurate. Under the present state of Louisiana law, the determination of whether an eyewitness identification expert may testify is made on a case-by-case basis. The state trial court remains "gatekeeper," and any Louisiana defendant possesses the ability to qualify an expert in the field of eyewitness identification.

In Louisiana, the determination regarding the competency of a witness is a question of fact. *Cheairs v. State ex rel. Dept. of Transp. & Dev.*, 03-0680 (La. 12/3/03), 861 So.2d 536, 541. Louisiana Code of Evidence article 702 dictates the admissibility of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

> knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In *State v. Foret*, 628 So.2d 1116, 1121 (La. 1993), the Louisiana Supreme Court found the language set forth by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), persuasive for determining the reliability of expert scientific testimony under La. C.E. Art. 702. *Foret*, 628 So.2d at 1121. Thus, Louisiana requires district courts to perform a "gatekeeping" function to "ensure that any and all scientific testimony or evidence admit ed is not only relevant, but reliable." *Foret*, at 628 So.2d 1121-22. More recently, the Louisiana Supreme Court adopted the following three-prong test to determine the admissibility of expert testimony:

> . . . [T]he admission of expert testimony is proper only if all three of the following things are true: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue . . . [Stated another way,] there are three intertwined bases for excluding testimony under Rule 702(1) if the testimony will not assist the trier of fact;

> (2) if scientific evidence is not sufficiently reliable; and (3) if the particular expert does not have sufficient specialized knowledge to assist the jurors.

Cheairs, 861 So.2d at 541-42 (citations omitted).

In *State v. Stucke*, 419 So.2d 939 (La. 1982), a case decided prior to *Foret* and *Cheairs*, a Louisiana defendant contended that a trial court had erred by excluding the testimony of an eyewitness identification expert. *Stucke*, 419 So.2d at 944. In *Stucke*, the trial judge had ruled that a doctor's testimony could not be presented to the jury because grave doubt existed about the competency of the evidence. Specifically, the lower court placed serious concerns on the manner in which the doctor's tests were conducted and the number of variables found within the experiments. The Louisiana Supreme Court agreed, concluding that the trial court did not abuse its discretion in ruling the eyewitness identification expert was incompetent to testify: "We therefore conclude that the trial court did not abuse his discretion in failing to allow the expert witness to testify. The testimony sought to be elicited from him would not have been an aid to the jury." *Stucke*, 419 So.2d at 945.

Concurring, Justice Lemmon wrote to explain that the Court had not adopted a *per se* rule regarding the inadmissibility of eyewitness identification experts:

> Although I agree that the trial judge, under the circumstances of this case, did not abuse his discretion in refusing to permit defendant to offer the testimony of the "identification expert", **it is not necessary to decide whether the trial court must, under *all circumstances*, exclude such testimony as unhelpful to the trier of fact. Trial courts should not view this decision as imposing a "rule of inadmissibility" with regard to expert testimony of the nature offered here**. Rather, trial courts should cautiously approach the question of admissibility of such evidence in each instance and decide whether, under the peculiar facts of the particular case, the "specialized knowledge" of an expert in the form of opinion evidence would assist the jury in deciding the question of identity. See Fed.R.Evid. 702.

Stucke, 419 So.2d at 951 (original emphasis).

The supreme court's refusal to adopt a *per se* bar to eyewitness identification experts was reiterated just one year later in the case of *State v. Chapman*, 436 So.2d 451 (La. 1983). In *Chapman*, the trial court permitted a psychologist to testify concerning research that substantially tended to discredit the accuracy of eyewitness testimony. Fully understanding that *Stucke* allowed for the possibility that eyewitness identification experts could testify in Louisiana, the *Chapman* court referenced Justice Lemmon's concurrence and stated that the trial

court possessed the discretion to accept or reject the doctor's testimony:

> This court held in *State v. Stucke,* 419 So.2d 939 (La.1982), that defendant was not entitled to offer such evidence, on the theory that the potential persuasiveness of this type of testimony might have a greater influence on the jury than the other evidence and might thus invade the province of the jury. A concurring opinion emphasized that the trial judge may (as was done here) exercise his discretion in favor of admitting such evidence, in the interest of justice, when the judge determines that the proffered evidence would assist the jury in deciding the question of identity. 419 So.2d at 951.

Chapman, 436 So.2d at 453, n. 6.

Post-*Chapman*, the Louisiana Supreme Court once again considered the issue of the admissibility of expert eyewitness testimony in *State v. Higgins.* 03-1980 (La. 4/1/05), 898 So.2d 1219, 1239-40, *cert. denied,* 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). In *Higgins,* a defendant alleged the trial court erred by disallowing his eyewitness identification expert to testify. In *Higgins*, the supreme court utilized La. C.E. Art. 702 to determine the competency of the alleged eyewitness identification expert. Understanding that *Stucke* and its progeny had never articulated a bright-line rule, *Higgins* expressed:

> [The] trial judge is vested with wide discretion in determining the competence of an

> expert witness. Competence of an expert witness is a question of fact to be determined within the sound discretion of the trial judge; h[er] rulings on the qualifications of expert witnesses will not be disturbed in the absence of manifest error." *State v. Stucke,* 419 So.2d 939, 944 (La.1982) (citing *State v. Drew,* 360 So.2d 500 (La.1978)).
>
> Under *Stucke* and its progeny, a trial court **may** exclude expert testimony regarding the reliability of eyewitness identification. *Stucke,* 419 So.2d at 945; *see also State v. Ford,* 608 So.2d 1058, 1060-1061 (La. App. 1st Cir.1992); *State v. Velez,* 588 So.2d 116, 134 (La. App. 3 Cir.1991).

Higgins, 898 So.2d at 1239-40 (original emphasis).

Once again citing Justice Lemmon's concurrence, the court ruled that the trial court did not abuse its discretion in refusing to find the witness competent:

> While the defendant claims that the particular facts of this case present the rare instance in which the "'specialized knowledge' of an expert in the form of opinion evidence would assist the jury in deciding the question of identity," *Stucke,* 419 So.2d at 951 (Lemmon, J., concurring),. . . .

Higgins, 898 So.2d at 1240.

Finally, in *State v. Young*, the state trial court ruled that Dr. Roy Malpass was qualified as an expert in eyewitness identification and that he had proven eyewitness identification psychology was a reliable science. In *Young*, the Louisiana Supreme Court was called upon to determine whether the trial court's acceptance of Dr. Malpass as a competent expert had been an abuse of discretion.

Well aware that *Stucke* and its progeny had repeatedly declined to adopt a bright-line rule regarding the inadmissibility of eyewitness identification experts, the state expressly prayed for the Louisiana Supreme Court to adopt such a bright-line rule. Although squarely given the opportunity, the court refused to adopt such a position.

In granting the state's writ, Justice Guidry, writing for three justices of a six justice court,[4] declined to overrule *Stucke*:

> **The proposed testimony on the general factors potentially contributing to a misidentification does not satisfy the standard articulated under Louisiana Code of Evidence article 702.** While being aware of the vast discretion to be afforded to trial courts in their determinations of the admissibility of expert evidence, **we find the district court abused its discretion in allowing Dr. Malpass to testify at trial.**

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[4] Chief Justice Kimball did not participate in the decision.

Young, 35 So.3d at 1050 (original emphasis). Three justices wrote separately, concurring in result. Justice Johnson wrote separately to reiterate that *Stucke* had never served as a complete bar to the admission of expert testimony regarding eyewitness identification:

> Rather than establishing a brightline rule, our jurisprudence has determined that the admissibility of expert witness testimony should be made on a case by case basis. In *State v. Chapman,* 436 So.2d 451, 453 (La.1983), the trial court allowed expert testimony concerning studies which generally reflected the fallibility of eyewitness identification in certain circumstances. Although the question of admissibility was not an issue on appeal in *Chapman,* this Court, in a footnote, cited the *Stucke* decision, and discussed the concurring opinion in *Stucke* which emphasized the trial court's discretion in admitting such evidence, in the interest of justice, when the court determines that the proffered evidence would assist the jury in deciding the question of identity. [. . .]
>
> In the case at bar, I agree, that based on the facts presented, the majority is correct in vacating the trial court's ruling admitting the expert testimony because there were multiple eyewitnesses, and ample corroborating evidence to support defendant's conviction. The fallibility of human perception and memory, in general, is consideration in those cases where the lone witness' identification is not supported by other testimony or evidence.

> It is my view, that expert witness testimony regarding the reliability of eyewitness identification is not *per se* inadmissible in every case."

Young 35 So.3d at 1051-52. Justice Knoll concurred separately to write in favor adopting a bright-line rule:

> The State has more than convincingly demonstrated an expert's testimony regarding this "field of eyewitness identification psychology" **will never be able** to satisfy the applicable standard. Therefore, in my view, the resolution of the issue in this case concerning the admissibility of expert testimony regarding this "junk science" is best resolved **by the adoption** of a *per se*/bright-line rule of inadmissibility.

Young, 35 So.3d at 1052 (original emphasis). Finally, Justice Weimer wrote a brief concurrence stating that, "[b]ecause there are facts in this matter which corroborate the eyewitness identification, I concur in the result." *Young*, 35 So.3d at 1052.

Young is the Louisiana Supreme Court's most recent pronouncement on the topic of eyewitness identification experts. When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of a majority, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' *Marks v. U.S.*, 430 U.S. 188, 193 97 S.Ct. 990, 993 51 L.Ed.2d 260 (1977).

Thus, it is well established that when a court is confronted with a plurality opinion, the court must, "look to that position taken by those Members who concurred in the judgments on the narrowest grounds." *Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Personnel of Tex., Inc.*, 343 F.3d 355, 358 (5th Cir. 2003). In *Young*, three justices reaffirmed *Stucke*, a case that had never been viewed as placing a *per se* bar on allowing eyewitness identification experts to testify. Concurring, Justice Johnson shunned any possible *per se* rule regarding eyewitness experts and stated that the admissibility of such testimony must be considered on a case-by-case basis. Finally, Justice Weimer also eschewed the adoption of a bright-line rule, noting the circumstances of the case dictated exclusion of the witness.

The state agrees with Justice Knoll that the field of eyewitness identification psychology cannot and will not be a reliable science. Indeed, the field of eyewitness identification psychology is a "junk science." However, Justice Knoll was the **only** justice who believed that Louisiana should adopt a *per se* rule, and one-sixth of a court does not set precedent. Justice Knoll's declaration that she would adopt a *per se*/ bright-line rule necessarily conceded that Louisiana still had yet to adopt such an approach. If Louisiana actually had a *per se* rule regarding this issue, Justice Knoll's concurrence would have been completely unnecessary.

Stucke set the precedent that eyewitness identification expert testimony would not be deemed

inadmissible "in all circumstances." That precedent was followed in *Chapman* and *Higgins*, and it remains in effect to this day. The narrowest interpretation of *Young* leads to the undeniable conclusion Louisiana did not adopt a *per se* rule of inadmissibility for eyewitness identification expert testimony. In fact, the narrowest interpretation of *Young* means that Louisiana has relaxed its position with respect to the field of eyewitness identification. And notably, while their reasons varied, all six justices could agree that Dr. Malpass' testimony was not appropriate in petitioner's case.

While the state might have "won" its writ application at the state court level, it "lost" in its attempt to have Louisiana adopt a *per se* rule regarding eyewitness identification testimony. From *Stucke* to *Young*, Louisiana has repeatedly refused to erect a *per se* barrier to the expert testimony petitioner sought to introduce. On at least one occasion, an expert in eyewitness identification has testified in Louisiana. Unfortunately for the state, the *Young* decision keeps the issue of expert eyewitness identification qualification on a case-by-case basis.

La. C.E. Art. 702 allows a court to exclude scientific evidence when it is unreliable or will not assist a trier of fact. It is not a *per se* rule. A *per se* evidentiary rule, one like the military evidentiary rule[5] this Court

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[5] The *per se* rule considered in *Scheffer* was Military Rule of Evidence 707(a), which provided in relevant part:

(Continued on following page)

considered *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), mandates that a court take a particular action with respect to the evidence. A *per se* rule does not give a court discretion to abuse. Given the testimony provided by Dr. Malpass at the January 8th expert hearing, it is truly amazing that any court could ever find the field of eyewitness identification sufficiently reliable. Regardless, Louisiana did not create a *per se* rule simply because it determined Dr. Malpass was an incompetent witness. Dr. Malpass is an incompetent witness, but a Louisiana defendant still remains free to establish that his eyewitness identification expert is competent to testify. Of course, that defendant's purported expert must be able to prove how the scientific field is both reliable and relevant. Here, the trial court abused its discretion as "gatekeeper" because Dr. Malpass did not establish how his field of science was reliable or how his testimony would assist the trier of fact in petitioner's case.

Had Louisiana actually adopted a *per se* rule with respect to eyewitness identification expert testimony, such a rule would be constitutional under the eight-justice holding espoused in *Scheffer*. The

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Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence. *Scheffer*, 523 U.S. 306-07, 118 S.Ct. 1263.

complete lack of consensus and ongoing good faith debate as to whether the science of eyewitness identification can ever be reliable allows individual jurisdictions, which possess a legitimate interest in ensuring reliable evidence is presented to the trier of fact, to reasonably reach differing conclusions on whether to admit such evidence. *Scheffer*, 523 U.S. 308-12, 318, 118 S.Ct. 1264-66, 1269. However, the undeniable fact remains that there is no *per se* rule in Louisiana respecting experts in eyewitness identification. The state cannot be forced to combat a rule that does not exist. Petitioner may not be pleased with his result, but he cannot misstate the law to construct a Constitutional claim.

CONCLUSION

WHEREFORE, the State of Louisiana prays that petitioner's application for writ of certiorari be dismissed and/or denied.

Respectfully submitted,

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SUPREME COURT
STATE OF LOUISIANA

2009-KK-1177

STATE OF LOUISIANA

Versus

TRACEY YOUNG

APPLICATION FOR REHEARING ON BEHALF OF
TRACEY YOUNG

TO THE DECISION OF THIS COURT
RENDERED APRIL 5, 2010

ON WRIT OF REVIEW TO THE

FIRST CIRCUIT COURT OF APPEAL
NUMBER: 09-KW-0154

NINETEENTH JUDICIAL DISTRICT COURT
NUMBER: 10-06-0811

Respectfully submitted:

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APPLICATION FOR REHEARING

The application of **Tracey Young** respectfully represents:

A.

Tracey Young is aggrieved by the recent opinion of this Court. That opinion – which establishes a per se proscription against all eyewitness-identification expert testimony – is irreconcilable with the United States Supreme Court's decision in **Daubert v. Merrell Dow Pharmaceuticals, Inc.**[1] There, the Court cautioned against categorical prohibitions of entire classes of expert conclusions; advising that in determining whether to admit testimony, the focus "must be solely on principles and methodology, not on the conclusions that they generate."[2]

This Court's decision ignores that principal, focusing rather on the results rather than the method:

> The proposed testimony on the general factors contributing to a misidentification does not satisfy the standard for admission of expert testimony articulated under Louisiana Code of Evidence article 702 **because** the testimony will not aid the jury in its deliberations and, instead, is inclined to be more

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[1] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[2] 509 U.S. at 595.

prejudicial than probative in value.[3] **(Emphasis added).**

To meet the mandates of **Daubert**, this Court should grant a rehearing and vacate its bright-line ruling, adopting a framework for lower courts to apply on a case by case basis.

B.

Second, this Court's opinion overlooks the plethora of research that scientifically supports the admissibility of eyewitness identification. Courts across the country recognize that while compelling, eyewitness testimony may be the least reliable.[4] Decades of studies that have established eyewitnesses are prone to identifying the wrong person as the perpetrator of crime have convinced courts that expert testimony is necessary to adequately educate a jury regarding factors such as (1) the difficulties with cross-racial identification, (2) the deficiencies in human perception and memory, and (3) the confidence or lack of confidence in the identification in light of lighting conditions, distinctiveness of the culprit's appearance and the presence of a weapon or other distraction. Testimony of this nature does not invade the

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[3] **State v. Young**, 2009-1177, p. 9 (La. 4/5/10), ___ So.3d ___.

[4] **United States v. Moore**, 786 F.2d 1232 (5th Cir. 1986) (the scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point).

exclusive province of the jury but provides the jury useful information to use in evaluating an eyewitness's testimony.

C.

Third, expert testimony on eyewitness testimony is not more prejudicial than probative. It does not, as this Court believes, focus upon the things that produce error without reference to those factors that improve the accuracy of identifications. The use of eyewitness expert testimony **is not** predicated upon a presumption of a misidentification, but merely serves to educate the jury on factors to consider in evaluating whether an identification is correct. These factors can just as easily convince a jury as to the reliability of an eyewitness identification as it can foster a disbelief. When expert testimony is used correctly, the end result is a jury that is better able to reach a just decision.[5]

D.

Finally, this Court has relied upon distorted facts. While there are two persons who allegedly witnessed the murder of Aaron Arnold and the shooting of Dionne Grayson, only Grayson has consistently appeared at court hearings. The East Baton Rouge Parish District Attorney's Office has continually

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[5] **State v. Clopten**, 223 P.3d 1103, 1109 (Utah 12/18/09).

failed since 2006 to produce Nancy Sedora, an illegal alien who does not speak English and who did not provide police with details of the incident. Moreover, the numerous pieces of physical and forensic evidence, bullet casings, cigarette butts, chewing gum and fingerprints from a vehicle, do not implicate Young.

Therefore, this is precisely the type of case in which eyewitness-identification expert testimony would be of particular use. Expert testimony should be admitted when there is no other inculpatory evidence presented against the defendant with the exception of a small number of eyewitness identifications.[6]

E.

This application complies with Louisiana Supreme Court Rule IX. Defendant moves simultaneously for an extension of time until April 30, 2010, in which to file a memorandum in support of this application.

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[6] **United States v. Moore**, 786 F.2d 1308 (5th Cir. 1986) (In a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged . . .)

F.

Young, therefore, prays that this Court grant his application for rehearing and thereafter order that the opinion issued March 4, 2010 be withdrawn. Young prays that this Court issue a substitute opinion that finds admissible under Louisiana Code of Evidence Rule 702 and relevant under Louisiana Code of Evidence Rule 403 expert eyewitness testimony or minimally adopts a framework for trial courts to apply on a case by case basis.

/s/ Mark D. Plaisance
MARK D. PLAISANCE
Appellate Counsel

SWORN TO AND SIGNED before me on this 16th day of April 2010.

/s/ John Brown
NOTARY PUBLIC

John Olin Brown, LA
Notary Public #9332
My Commission
is for Life

[Verification Of Service Omitted In Printing]